IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-448

BLUE CROSS MUTUAL HOSPITAL INSURANCE, INC.,

BLUE SHIELD MUTUAL MEDICAL INSURANCE, INC.

Petitioners,

vs.

BEVERLY JEANNE JENKINS

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court review the unanimous determination of a Circuit Court sitting *in banc* in a case properly

within its jurisdiction that the Order appealed from was necessarily based on an erroneous prior ruling of the District Court?

2. Should this Court review the manner in which the Court below applied the "like or related" test which is accepted in all circuits as the basis for determining whether an E.E.O.C. charge of discrimination is a proper predicate for a lawsuit based on that charge?

COUNTERSTATEMENT OF FACTS

Stripped of its adverserial rhetoric, petitioner's statement of facts is generally accurate. Since there is an accurate summary of the facts set forth in the *in banc* opinion, we will not burden the Court with another recitation of the facts of this case. There are, however, three significant distortions or omissions in Petitioner's statement of the case which should be noted by the Court in ruling upon this Petition.

(1) *Respondent waited over fourteen months after filing her charge of discrimination before filing suit.* The Petition implies that respondent rushed to the Courthouse "before EEOC could investigate or attempt to conciliate her charge." (Petition, p. 5). In fact, respondent, a black woman, filed her charge of discrimination on June 8, 1971 and waited over fourteen months prior to filing suit on August 28, 1972. Thus, EEOC had the opportunity to process the charge for a period of more than double the statutory period of 180 days allowed by 42 USC § 2000e-5(f)(1) for such processing. Respondent did not rush to Court, she waited over eight months longer than she had to before filing suit.

(2) *Petitioners had a full opportunity to conciliate.* The Petition neglects to state that subsequent to the filing of

the complaint, the Court, on December 19, 1972, ordered that the action be stayed for sixty days "in order to encourage voluntary compliance." Despite respondent's willingness to participate in EEOC conciliation, the EEOC found that conciliation failed without the parties ever meeting. Thus, petitioner was given a direct opportunity to conciliate on all the allegations of the complaint and apparently declined it.

(3) *The Agency charged by Congress with administering Title VII supports the interpretation given to the like or related test by the Seventh Circuit.* The Petition fails to state that the Equal Employment Opportunity Commission—the Agency charged by Congress with administering Title VII— filed an amicus brief in support of the petition for rehearing below and argued before the Court *in banc*. The EEOC took the position urged by respondent below and adopted by the Seventh Circuit *in banc* that the like or related test should be liberally construed and that the respondent's EEOC charge was sufficiently like or related to the allegations of her complaint to be a proper predicate for the class action complaint.

ARGUMENT

I.

THE UNANIMOUS DETERMINATION OF THE COURT BELOW THAT THE ORDER APPEALED FROM WAS NECESSARILY BASED ON AN ERRONEOUS PRIOR RULING OF THE COURT RAISES NO QUESTIONS WORTHY OF SUPREME COURT REVIEW

As the Petition states, the District Court on July 17, 1974 denied class certification on the ground that the case was limited to denials of hire or promotion because of Afro hair styles and that there was no showing of a numerous class of victims of this discrimination. It also accurately states that plaintiff's motion for a preliminary injunction and/or partial summary judgment (which had been filed contemporaneously with the class action motion) was denied on January 21, 1975. What it neglects to state is that the only ground stated for this denial was "that there are material issues of fact to be litigated between the parties and summary judgment would be inappropriate." Order of January 21, 1975. (Petition at p. 1a).

When a timely appeal was filed from the January 21 Order, the Seventh Circuit was faced with an order which was erroneous on its face—it is not grounds for the denial of preliminary relief that material issues of fact need to be litigated; the whole purpose of preliminary relief is to provide an interim remedy while material issues are being litigated. The original panel concluded the Court's prior "class action determination controlled its subsequent denial of preliminary injunction" and reviewed the prior

Order as part of the Order denying preliminary relief. Opinion of Panel at fn. 5 and accompanying text. (Petition at pp. 10a-11a.) This finding was accepted by the entire Court *in banc*. This unanimous factual determination concurred in by all eight Circuit Judges who considered the case hardly raises an issue of sufficient importance for Supreme Court review. Thus the Court should clearly deny the Petition with respect to question 1 of the Petition.

II.

THE MANNER IN WHICH THE SEVENTH CIRCUIT INTERPRETED THE LIKE OR RELATED TEST IS NOT A QUESTION THAT SHOULD BE REVIEWED BY THIS COURT.

Although the Petition sets forth three additional questions on which petitioners seek review, all resolve into a single question: did the Seventh Circuit properly apply the "like or related" test for determining whether the original charge was an adequate predicate for the class allegations of race and sex discrmination set forth in the complaint. We show below that this question is not one which merits Supreme Court review.

A. There Is No Conflict Among the Circuits On The General Rule That A Title VII Complaint May Encompass Any Discrimination Like Or Related To The Allegations Of The Charge Or Growing Out of Such Charge.

The Petition does not assert, nor could it, that there is any conflict among the Circuits in the rule which governs when a Title VII charge is a sufficient predicate for the allegations of the complaint. As stated in the majority opinion below,

> "The correct rule to follow in construing EEOC charges for purposes of delineating the proper scope of a subsequent judicial inquiry is that 'the complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations"

citing *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971). (Petition, p. 22a) This view is concurred in by every other Circuit which has considered the question.

See

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973);

Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199, 202-203 (3rd. Cir. 1975);

Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975);

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970);

Tipler v. E. I. Dupont & Nemours Co., 443 F.2d 125 (6th Cir. 1971);

Ouchibon v. North American Rockwell Co., 482 F.2d 569 (9th Cir. 1973).

The rationale of these cases is eloquently stated in *Sanchez v. Standard Brands:*

> "Procedural technicalities are not to stand in the way of Title VII complainants. Nothing in the Act commands or even condones the application of archaic pleading concepts. On the contrary, the Act was designed to protect the many who are unlettered and

> unschooled in the nuances of literary draftsmanship. It would falsify the Act's hopes and ambitions to require verbal precision and finesse from those to be protected, for we know that these endowments are often not theirs to employ . . . it would be out of keeping with the Act to import common law pleading niceties to [the charge of discrimination] or in turn to hog-tie the subsequent lawsuit to any such concepts." 431 F.2d at 465.

Unable to find any conflict in the general rule governing the scope of private actions which may be brought after a charge of discrimination is filed, petitioners strain to find a conflict between the decision in this case and the rules applicable to the EEOC when it exercises its direct enforcement power pursuant to 42 USC §2000e-5(f)(1) of the Act. They argue that the decision in *EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976) is somehow in conflict with the instant decision. This is clearly not true. That case involved the question of whether the EEOC had standing to raise questions of sex discrimination against women when the private charges based on which it filed suit were filed by black males and alleged only race discrimination. The Court held that inasmuch as the EEOC had uncovered the pattern of sex discrimination during the course of a reasonable investigation of the charge filed, EEOC could bring suit for such sex discrimination even though the private plaintiffs were males, and might not have had standing to complain about discrimination against females.

Thus, *General Electric* holds only that EEOC may bring suit on any discrimination disclosed in the course of a reasonable investigation; it does not speak to the issue on which petitioners seek *certiorari*—the scope of a *private* lawsuit where EEOC has either not investigated or conducted a limited investigation.

Decisions in private lawsuits make it clear that:

> "the 'scope' of the judicial complaint is limited to the *'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.*"

Sanchez v. Standard Brands, supra, 431 F.2d at 466. (Emphasis added.) The uniformly accepted test is that the scope of the lawsuit is not limited by what EEOC did or did not investigate, but only what it *might* have investigated in a reasonable investigation. For example, even where the EEOC investigation does not extend to issues which it might have, the scope of a private lawsuit is not limited by the failure of EEOC to conduct a complete investigation. See *Gamble v. Birmingham Southern RR Co.,* 514 F.2d 678 (5th Cir. 1975). As *General Electric* makes clear, the scope of an EEOC investigation even on a narrow charge may be broad indeed. Thus, it supports the view of the Seventh Circuit that charges be given an expansive and sympathetic reading.

B. The Application of the General Rule to the Facts of the Instant Case Is Hardly An Issue Meriting Supreme Court Review.

When viewed in the context of the universally accepted rule that Title VII charges should be given an expansive reading, petitioners' quarrel with the decision below is really a quibble—they complain that the Seventh Circuit followed the policy of giving charges a sympathetic and expansive reading too well and gave the charge a broader reading than was reasonable. Even if this contention were true, which it is not, such an issue hardly makes a compelling case for Supreme Court review. With its case load, this Court should concern itself with cases whose decision

has important precedent setting value and not spend its time applying generally accepted rules of law to the peculiar facts of a specific case.

C. The Decision Below Makes No Inroads On the Policy In Favor of Conciliation and Voluntary Compliance.

With great solemnity and even greater hypocrisy, petitioners exalt the policy in favor of conciliation and voluntary compliance and claim that giving private parties the right to bring lawsuits broader than their EEOC charges frustrates this policy. As noted in the Counterstatement of Facts above, this action was stayed and petitioners given an opportunity to conciliate which they eschewed. It hardly lies in their mouths to complain that they were not given the opportunity to conciliate. cf. *Piva v. Zerox Corp.,* — F.Supp. —, 11 FEP Cases 1259, 1262-63 (N.D. Cal. 1975).

In addition, in the zeal of their advocacy, they seriously mislead the Court as to the nature of private Title VII proceedings. They imply that the ruling of the Court below makes serious inroads on the policy in favor of voluntary compliance and conciliation. This is not true. In order to properly evaluate their argument some background on the relationship of the administrative charge to the Court proceeding is essential.

Under 42USC § 2000e-5(f) (1), private parties have an absolute right to sue after one hundred-eighty days regardless of whether the EEOC has investigated the charge or attempted conciliation:

> ". . . if within one hundred and eighty days from the filing of [a] charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement

> to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved."

Thus, as this Court has made explicit, there are only two jurisdictional prerequisites to bringing suit under Title VII: (1) timely filing of a charge with the EEOC and (2) receiving and acting upon the statutory notice of the right to sue. *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 44 (1974). Thus, the failure of EEOC to process a charge in any manner is no bar to a Court suit.

What this means in the instant case is that if respondent had originally filed a charge of discrimination which was drafted by a lawyer and made explicit her less well articulated charges of class discrimination, one hundred and eighty days later she would have a right to bring a suit as broad as she did in her actual federal court suit. This would have been true even though EEOC had in no way investigated her charge or attempted conciliation. Petitioners would have a different result prevail here merely because respondent is not a lawyer and did not draft her charge as a pleading in a lawsuit. As the Court below indicated:

> "[t]he Civil Rights Act is designed to protect those who are least able to protect themselves. Complainants to the EEOC are seldom lawyers. To compel the charging party to specifically articulate in a charge filed with the Commission the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected . . ."

Opinion below at p. 23a, quoting *Willis v. Chicago Extruded Metals Co.*, 375 F.Supp. 362, 365-366 (N.D. Ill. 1974).

There are additional policy reasons why the ruling of the Court below is appropriate. Petitioners' arguments, if accepted, would limit the role of the private lawsuit in Title VII proceedings in every case where EEOC has been unable to complete processing of the charge. Such a limited role flies in the face of this Court's holding that:

> "the private action remains an essential means of obtaining judicial enforcement of Title VII."

Alexander v. Gardner-Denver Co., supra.

Moreover, the rule urged by petitioner would serve to further encumber the administrative procedure, not promote conciliation. As this Court has noted, there are "significant delays that have attended administrative proceedings in the EEOC" because of its backlog of cases. *Johnson v. Railway Express Agency*, 421 US 454 at fn. 11 (1975). The rule urged by petitioner would contribute to further delays by discouraging private parties from suing until the EEOC had fully processed the charge. In its brief *amicus* in support of the petition for rehearing and at oral argument, the EEOC made clear that it urged a broad reading of the charge not only because of its philosophical support for full enforcement of Title VII rights, but also because of its very practical need for the assistance of private class actions to eliminate discriminatory practices and help clean up its seriously overloaded docket. With such aid, the Government will be able to reduce its backlog of old cases and bring its administrative processes to cases more quickly. Without it, the EEOC will continue to labor under the burden of an intolerable case load and be less able to function efficiently in any of the cases. Thus, peti-

tioners' programmatic support for conciliation does not make good general policy sense. In practice, of course, this support is a disingenuous attempt to use a legal technicality to preclude scrutiny of their employment practices.

CONCLUSION

For all of the foregoing reasons, the petition should be denied in its entirety. Because petitioners have obtained a stay of the mandate of the Court below, we ask that this be done expeditiously.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of Plaintiff's "Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" has been mailed to Mr. Reed D. Scism, Roberts, Ryder & Rogers, One Indiana Square #2020, Indianapolis, Indiana 46204, this 27th day of October, 1976.

/s/ John O. Moss

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